

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE )  
1899 L Street, N.W. )  
12th Floor )  
Washington, D.C. 20036 )

Plaintiff, )

v. )

C.A. No. 12-1483

UNITED STATES DEPARTMENT OF )  
THE TREASURY )  
1500 Pennsylvania Avenue, NW )  
Washington, D.C. 20220 )

Defendant. )

**COMPLAINT FOR DECLARATORY RELIEF AND  
RELIEF IN THE FORM OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE for its complaint against  
Defendant UNITED STATES DEPARTMENT OF THE TREASURY (“Treasury”),  
alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under two requests for certain described records from two Treasury offices using the word “carbon” over an eight-month period in 2012.
- 2) CEI sent these FOIA requests by facsimile on August 8, 2012.
- 3) Treasury did not respond to Plaintiff’s request within twenty working days as required under FOIA by either by producing responsive records, or acknowledging the request,

providing an identification number, and indicating an intention to begin processing or otherwise an intention to comply with the request.

- 4) By Defendant's failure to respond, Plaintiff has no initial determination to administratively appeal, and has the right to seek judicial remedy. *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).
- 5) The Treasury Department is an agency subject to FOIA and is accountable to the taxpayers and to the public. It should not be free to disregard its FOIA obligations.
- 6) Transparency in government service is a legal requirement that has become the subject of great public interest and priority, and specific and high-profile promises from the president and attorney general of the United States. Meanwhile, media reports have informed taxpayers that a "carbon tax" is being developed for the expected post-election "lame duck" session of Congress later this year.

### **PARTIES**

- 7) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable energy and environmental policy. CEI's programs include research and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 8) Defendant Treasury is a federal agency, headquartered in Washington, DC.

### **JURISDICTION AND VENUE**

- 9) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

- 10) Venue is proper in this Court under 28 U.S.C. § 1391(b) because Plaintiff's and Defendant's principal place of business is in the District of Columbia.

**FACTUAL BACKGROUND**

- 11) This lawsuit seeks to compel Treasury to respond fully and completely to two FOIA requests dated August 8, 2012 (Ex.s 1 and 2). The request sought specifically described agency records dated over an eight-month period in 2010.
- 12) Defendant is required under FOIA to respond to requests within 20 working days.
- 13) Treasury's responses were due by September 6, 2012.
- 14) Treasury has failed to provide any substantive response to Plaintiff's requests.
- 15) Plaintiff is entitled to the requested information, and to judicial review of Defendant's refusals to provide the information.

**Plaintiff's FOIA Request Seeking Certain Records of the  
Office of the Deputy Secretary**

- 16) On August 8, 2012, Plaintiff sent a request for records by facsimile to Treasury at 202.622.3895, seeking:
- copies of any and all record(s), correspondence, memoranda, analysis, email or other **records using the word "carbon"** which were produced, sent or received by the **Office of the Deputy Secretary for Environment and Energy** during 2012, **from January 1, 2012 until the date you process this Request.** (emphases in original)

**Plaintiff's FOIA Request Seeking Certain Records of the  
Office of Legislative Affairs**

- 17) On August 8, 2012, Plaintiff sent a request for records by facsimile to Treasury at 202.622.3895, seeking:

copies of any and all record(s), correspondence, memoranda, analysis, email or other **records using the word “carbon”** which were produced, sent or received by the **Office of Legislative Affairs** during 2012, **from January 1, 2012 until the date you process this Request.** (emphases in original)

**Defendant's Response to Plaintiff's FOIA Requests**

- 18) Treasury has failed to formally acknowledge or respond in any substantive way to Plaintiff's request as required by FOIA.
- 19) After Plaintiff sent both requests by facsimile, one at 12:11 p.m. and the other at 12:17 p.m. on August 8, 2012, it received an Email from Cawana Pearson [Cawana.Pearson@treasury.gov], at 1:10 p.m. Eastern time stating, *in toto*, “We received your two FOIA requests submitted to our office. However, the first FOIA request regarding Office of the Deputy Secretary for Environment and Energy during 2012, was not receive in its entirety – Page 6 is entirely distorted. Please refax your request to our office on 202-622-3895. You are welcome to call me on 202-622-3503 for confirmation of receipt.”
- 20) Plaintiff re-faxed the request to the Office of the Deputy Secretary for Environment and Energy at 1:24 p.m. Eastern time the same day.
- 21) Defendant replied by Email from Ms. Pearson at 2:52 p.m. Eastern time the same day, stating, *in toto*, “I received it via fax. Thanks!”.
- 22) Defendant never provided an acknowledgement letter assigning an identification number or indicating an intention to process Plaintiff's request.

**FIRST CLAIM FOR RELIEF**

**Release of Certain Records using the Word “Carbon” -- Declaratory Judgment**

- 23) Plaintiff re-alleges paragraphs 1-22 as if fully set out herein.

- 24) Agencies covered by FOIA are required to provide substantive responses to requests for information within twenty working days. 5 U.S.C. § 552(a)(6)(A)(i). S
- 25) Merely stating that an agency received a legible copy of a request does not constitute a response. An agency must demonstrate an intention to process the request. See, e.g., *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).
- 26) Treasury owed Plaintiff a substantive response to its requests for information by September 6, 2012.
- 27) FOIA requires all doubts to be resolved in favor of disclosure. It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)).
- 28) The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Ibid.*
- 29) Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. See, e.g., *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an

Exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n. 3; *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d at 515.

30) Federal statutes require that agencies, e.g., “foster greater sharing, dissemination, and access to public information,” and “promote public access to public information”. 44 U.S.C. § 3504. All disclosure obligations, including FOIA’s requirements, are to be accorded additional weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law, to which Plaintiff specifically cited in its request to EPA to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

31) The attorney general reaffirmed this with the *Memorandum for the Heads of Executive Departments and Agencies*, “The Freedom of Information Act,” March 19, 2009, and OIP Guidance, “President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a ‘New Era of Open Government,’” <http://www.justice.gov/oip/foiapist/2009foiapist8.htm>.

32) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

33) Plaintiff has a statutory right to the information it seeks.

34) By Defendant's actions Plaintiff has constructively exhausted its administrative remedies.

35) This Court should enter a judgment declaring that

- i. Documents in Treasury's possession using the word "carbon" are agency records under FOIA;
- ii. Treasury's response to Plaintiff's FOIA Request seeking the described records is not reasonable, and does not satisfy Treasury's obligations under FOIA;
- iii. Treasury's refusal to produce the requested records is unlawful; and
- iv. Treasury must produce those requested records.

#### **SECOND CLAIM FOR RELIEF**

##### **Release of Certain Records using the Word "Carbon" -- Injunctive Relief**

36) Plaintiff re-alleges paragraphs 1-35 as if fully set out herein.

37) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's request described, *supra*.

38) This Court should enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining Defendant from further withholding responsive records and ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested records using the word "carbon", or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

#### **THIRD CLAIM FOR RELIEF**

##### **Costs And Fees – Injunctive Relief**

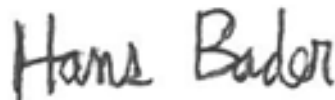
39) Plaintiff re-alleges paragraphs 1-38 as if fully set out herein.

- 40) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 41) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.
- 42) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.



Respectfully submitted this 7th day of September, 2012,

A handwritten signature in dark ink that reads "Hans Bader". The signature is written in a cursive style with a vertical line at the end.

Hans Bader  
D.C. Bar No. 466545

A handwritten signature in dark ink that reads "Christopher C. Horner". The signature is written in a cursive style with a long horizontal stroke at the end.

Christopher C. Horner  
D.C. Bar No. 440107

Sam Kazman  
D.C. Bar No. 946376

1899 L Street, N.W.  
Suite 1200  
Washington, D.C. 20036  
(202) 331-1010

Attorneys for Plaintiff

September 7, 2012